A

AMAL BAKTI SDN BHD & ORS

v.

AFFIN MERCHANT BANK (M) BHD

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ALIZATUL KHAIR OSMAN JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02-1390-2009]

C

16 DECEMBER 2011

TORT: *Negligence - Negligent misstatement - Duty of care, scope and limit of - Economic loss - Test to be applied - Relationship of sufficient proximity - Whether advising bank in restructuring scheme owes duty to*

D

potential purchasers of shares - Whether bank knew its statements would be relayed to and relied on by investors - Duty to ensure accuracy of statements and independence of source - Whether duty of care discharged

TORT: *Negligence - Negligent misstatement - Economic loss - Duty of care - Standard of care - Whether satisfied - Duty owed to share*

E

investors by advising bank in restructuring scheme - Duty to use care in making statements and announcements - Whether sufficient for bank to rely on report of due diligence working group and information given by company's directors - Whether information must be verified independently - Duty of reasonable enquiry

F

CIVIL PROCEDURE: *Judgment - Consideration of unpleaded matters - Issues not pleaded as defences by defendants - Issues raised and decided upon by trial judge on own accord - Whether improper - Whether plaintiffs prejudiced - Whether judgment liable to be overturned on appeal*

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This was an appeal from the decision of the trial judge holding that the respondent ('Affin') was not liable in negligence to the appellants/share purchasers for the announcements and explanatory statement it made as the advising merchant bankers in

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a proposed restructuring scheme. As advisors of Omega Holdings ('Omega'), Affin had announced to Bursa Malaysia that Omega and Milan Auto would implement a restructuring scheme whereby, *inter alia*, (i) Milan Auto's retail business, in importing and distributing Alfa Romeo vehicles in Malaysia under a concession

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agreement with Fiat Auto of Italy ('Fiat') would be acquired by a new listing company Newco/Energro ('Newco') (ii) Milan Auto would offer selected investors (by private placement) 47 million ordinary shares in the capital of Newco (iii) through a 'business

transfer agreement' and a 'vehicle supply agreement' Milan Auto would transfer the restructured business to Milan Corp and supply Alfa Romeo cars to Milan Corp and (iv) Newco would acquire the total share capital of Milan Corp from Milan Auto (to be paid for through the issuance of 120 million Newco shares to Milan Auto). Thereafter, Affin announced to Bursa Malaysia that the Securities Commission ('the SC') had approved the restructuring scheme. Affin then issued an 'explanatory statement' and 'circular to shareholders' stating, *inter alia*, that (i) Fiat had no objections to the business transfer agreement (ii) the concession agreement between Milan Auto and Fiat was subject to tenure and extension of franchise risks and (iii) the listing status of Omega on the main board would be transferred to Newco. A public prospectus was then issued by Affin on the private placement of the 47 million Newco shares, in which it reaffirmed the details of its previous statements on the restructuring scheme. Subsequently, the SC revoked its approval for both the restructuring scheme and the listing of Newco on Bursa Malaysia but, by this time, Milan Auto had already sold the Newco shares to the appellants. Unknown to the appellants, the concession agreement between Milan Auto and Fiat had been mutually terminated some time ago. The SC then successfully moved the High Court for orders setting aside the sale of the Newco shares as void *ab initio* and that the appellants be restituted. No restitution, however, was made by Milan Auto and the appellants brought an action for negligent misstatement and breach of statutory duty (Securities Commission Act 1993, ss. 32B(1) & 58(1)) against Affin. For negligent misstatement, it was alleged that the following representations made by Affin in its explanatory statement and announcements were false or untrue: (i) that the concession agreement between Milan Auto and Fiat was still subsisting and enforceable at the material time (ii) that Fiat had been informed of and had no objections to the business transfer agreement and (iii) that Milan Auto's retail business in Alfa Romeo vehicles could lawfully be transferred to Newco *vide* Milan Corp.

Held (allowing appeal with costs; setting aside order of High Court)

Per Anantham Kasinather JCA delivering the judgment of the court:

(1) Affin owed a duty to use care with respect to the representations it made in its explanatory statement and announcements. The real question, however, was whether the

A scope of the duty of care owed by an advisor (such as Affin) extended to investors (such as the appellants) who claimed that they had been induced into purchasing the shares on account of the advisor's statements. (paras 16 & 19)

B **(2)** Affin knew, or ought to have known, that its statements and announcements would be communicated to the appellants who would very likely rely on them in deciding whether or not to purchase the Newco shares from Milan Auto. There was thus a relationship of sufficient proximity such that it would be fair, C just and reasonable that the scope of Affin's duty of care be extended to cover the appellants and the share transactions between the appellants and Milan Auto. In performing its role as the advising bankers in the restructuring scheme, Affin was under a duty to ensure that the information it provided to D potential investors was accurate and had been obtained from independent sources of the highest quality. (paras 19-21)

(3) The steps undertaken by Affin in the purported discharge of its duty of care to the appellants fell short of the standard E expected of a licensed merchant bank. In issuing the explanatory statement and making the announcements, it was insufficient for Affin to merely rely on the report of the due diligence working group and/or the information provided by the directors of Omega and Milan Auto (who were interested F parties) without attempting to verify such information independently. (para 26)

(4) The terms of the concession agreement between Milan Auto and Fiat expressly precluded Milan Auto from assigning the franchised business to any party. Hence, Milan Auto was G never capable of injecting the business into Milan Corp and implementing the restructuring scheme. In fact, the concession agreement had even been terminated mutually some time ago. The SC discovered this and revoked its approval for the restructuring scheme. As the advising merchant bank, Affin did H not even verify this fact by simply writing to Fiat as did by the SC. The trial judge was wrong in absolving Affin of this duty of reasonable enquiry. (paras 22, 24 & 29)

(5) The issues on contributory negligence, the effect of the I judgment obtained by the SC against Milan Auto and the allegedly champertous nature of the agreements between the appellants and the original purchasers of the Newco shares

were not defences pleaded by Affin. The trial judge ought not to have raised such unpleaded matters on his own accord and decided upon them against the appellants. Appellate interference was warranted as the trial judge was wrong both in his application of the law and his appreciation of the facts. (paras 34, 35 & 38)

[The respondent was ordered to pay the 1st, 2nd and 3rd appellants RM1 million, RM1 million and RM4.35 million respectively.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan hakim perbicaraan dalam memutuskan bahawa responden ('Affin') tidak bertanggungan atas kecuaian terhadap perayu-perayu/pembeli saham bagi pengumuman dan penyata penjelasan yang dibuat sebagai bank penasihat dalam suatu cadangan skima penstrukturan semula. Sebagai penasihat kepada Omega Holdings ('Omega'), Affin telah mengumumkan kepada Bursa Malaysia bahawa Omega dan Milan Auto akan melaksanakan satu skima penstrukturan semula di mana, *inter alia*, (i) perniagaan jualan Milan Auto, dalam mengimport dan mengedar kenderaan Alfa Romeo di Malaysia di bawah perjanjian konsesi dengan Fiat Auto dari Italy ('Fiat') akan diperolehi oleh satu syarikat penyenaraian baru Newco/Energro ('Newco') (ii) Milan Auto akan menawar pelabur-pelabur terpilih (melalui penempatan swasta) 47 juta saham biasa ke dalam modal Newco (iii) melalui satu 'perjanjian pindahmilik perniagaan' dan 'perjanjian pembekalan kenderaan', Milan Auto akan memindahmilik perniagaan yang telah distruktur semula kepada Milan Corp dan membekalkan kereta Alfa Romeo kepada Milan Corp dan (iv) Newco akan memperolehi jumlah modal saham Milan Corp daripada Milan Auto (dibayar melalui pengeluaran 120 juta saham Newco kepada Milan Auto). Berikutan itu, Affin telah mengumumkan kepada Bursa Malaysia bahawa Suruhanjaya Sekuriti ('SS') telah meluluskan skima penstrukturan semula itu. Affin kemudiannya telah mengeluarkan satu 'kenyataan penjelasan' dan 'pekeliling kepada pemegang-pemegang saham' menyatakan, *inter alia*, bahawa (i) Fiat tidak mempunyai bantahan terhadap perjanjian pindahmilik perniagaan (ii) perjanjian konsensi di antara Milan Auto dan Fiat adalah tertakluk kepada tempoh dan risiko pelanjutan francais dan (iii) status penyenaraian Omega pada papan utama akan dipindahmilik kepada Newco. Satu prospektus awam dikeluarkan oleh Affin terhadap penempatan swasta bagi 47 juta saham Newco, dimana ianya telah mengesahkan maklumat-maklumat kenyataan terdahulunya

berkenaan skima pengstrukturan itu. Seterusnya, SS telah membatalkan kebenarannya bagi kedua-dua skima penstrukturan semula dan penyenaraian Newco di Bursa Malaysia tetapi, pada masa itu, Milan Auto telah pun menjual saham Newco kepada perayu-perayu. Tidak diketahui oleh perayu-perayu, perjanjian konsensi di antara Milan Auto dan Fiat telah pun dibatalkan bersama beberapa ketika dahulu. SS kemudiannya telah berjaya memerintahkan Mahkamah Tinggi untuk perintah mengenepikan penjualan saham Newco sebagai tak sah *ab initio* dan bahawa perayu-perayu direstitusi. Tiada restitusi, walaubagaimanapun, dibuat oleh Milan Auto dan perayu-perayu telah mengambil tindakan terhadap Affin untuk pernyataan silap secara cuai dan kemungkiran kewajipan statutori (Akta Suruhanjaya Sekuriti 1993, ss. 32B(1) & 58(1)). Bagi pernyataan silap secara cuai, ianya telah dialegasi bahawa representasi-representasi berikut yang dibuat oleh Affin di dalam kenyataan penjelasan dan pengumumannya adalah salah dan tidak benar: (i) bahawa perjanjian konsensi di antara Milan Auto dan Fiat masih wujud dan boleh dikuatkuasakan pada masa itu (ii) bahawa Fiat telah dimaklumkan dan tidak mempunyai bantahan terhadap perjanjian pindahmilik perniagaan dan (iii) bahawa perniagaan jualan Milan Auto bagi kenderaan Alfa Romeo boleh dipindahmilik secara sah kepada Newco melalui Milan Corp.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan perintah Mahkamah Tinggi)

Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

(1) Affin berkewajipan berjaga-jaga berkenaan representasi-representasi yang telah dibuat di dalam kenyataan penjelasan dan pengumuman-pengumumannya. Soalan sebenar, walaubagaimanapun, adalah, sama ada skop kewajipan berjaga-jaga yang ditanggung oleh seorang penasihat (seperti Affin) dilanjutkan kepada pelabur-pelabur (seperti perayu-perayu) yang mendakwa bahawa mereka telah didorong untuk membeli saham-saham berpandukan kenyataan penasihat.

(2) Affin telah mengetahui, atau sepatutnya mengetahui bahawa kenyataan dan pengumumannya akan disampaikan kepada perayu-perayu yang kemungkinan besar akan bergantung terhadap mereka dalam membuat cadangan sama ada untuk membeli saham-saham Newco atau tidak daripada Milan Auto. Oleh itu, terdapat perhubungan rapat yang adil dan munasabah di mana kewajipan berjaga-jaga dilanjutkan untuk

merangkumi perayu-perayu dan transaksi saham di antara perayu-perayu dan Milan Auto. Dalam melaksanakan peranannya sebagai penasihat bank dalam skima penstrukturan semula, Affin bertanggungjawab untuk memastikan bahawa maklumat yang disediakannya kepada bakal pelabur adalah tepat dan telah diperolehi daripada sumber-sumber bebas yang berkualiti tinggi.

(3) Langkah-langkah yang diambil oleh Affin dalam melepaskan kewajipan berjaga-jaganya kepada perayu-perayu jatuh di bawah standard yang dijangka bagi bank berlesen. Dalam mengeluarkan kenyataan penjelasan dan membuat pengumuman, ianya tidak mencukupi bagi Affin untuk bergantung kepada laporan ketelitian wajar pihak bekerja dan/atau maklumat yang dibekalkan oleh pengarah-pengarah Omega dan Milan Auto (pihak-pihak yang mempunyai kepentingan) tanpa berusaha untuk mengesahkan maklumat-maklumat tersebut secara bebas.

(4) Terma-terma perjanjian konsensi di antara Milan Auto dan Fiat telah secara ekspres mengecualikan Milan Auto daripada menyerahhak perniagaan francais kepada mana-mana pihak. Oleh itu, Milan Auto tidak mampu untuk memulakan perniagaan ke dalam Milan Corp dan melaksanakan skima penstrukturan semula. Faktanya adalah, perjanjian konsensi telah pun dibatalkan bersama beberapa ketika dahulu. SS mengetahui perkara ini dan membatalkan kebenaran untuk skima penstrukturan semula. Sebagai penasihat bank, Affin tidak mengesahkan fakta ini dengan menulis kepada Fiat seperti yang dibuat oleh SS. Hakim perbicaraan telah salah dalam membebaskan Affin daripada tugasnya bagi enquiri munasabah.

(5) Isu berkenaan kecuaian bersama, kesan terhadap penghakiman yang diperolehi oleh SS terhadap Milan Auto dan perjanjian bersifat salah di sisi undang-undang di antara perayu-perayu dan pembeli-pembeli asal saham Newco bukanlah pembelaan yang diplid oleh Affin. Hakim perbicaraan tidak sepatutnya membangkitkan perkara-perkara yang tidak diplid sebegitu dengan sendirinya dan membuat keputusan terhadap perayu-perayu. Campurtangan rayuan adalah wajar memandangkan hakim bicara khilaf dalam kedua-dua aplikasi undang-undang dan penilaian fakta-fakta.

[Responden diperintahkan untuk membayar perayu-perayu pertama, kedua dan ketiga RM1 juta, RM1 juta dan RM4.35 juta masing-masing.]

A **Case(s) referred to:**
Anns v. Merton London Borough Council [1978] AC 728 ***(refd)***
Candler v. Crane, Christmas & Co [1951] 2 KB 164 ***(foll)***
Caparo Plc v. Dickman [1990] 2 AC 605 ***(foll)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
B *Malaysian International Merchant Bankers Bhd v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia [2001] 1 CLJ 740 CA* ***(foll)***
Woods v. Duncan [1946] AC 4001 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(foll)***

C **Legislation referred to:**
Securities Commission Act 1993, ss. 32B(1), (2), 58(1)

For the appellants - Benjamin Dawson (Eileen Othman with him); M/s Benjamin Dawson
D *For the respondent - Ariff Rozhan (William Lim & Johnson Lim with him); M/s Zaid Ibrahim*

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D8-22-1819-2005]

Reported by Gan Peng Chiang
E

JUDGMENT

Anantham Kasinather JCA:

F **Background Facts**

[1] Omega Holdings Berhad ('Omega') is and was at the material time, a public listed company on the Bursa Malaysia Securities Berhad ('Bursa Malaysia'). On 26 February 2001, Omega
G announced that it was an affected issuer pursuant to Practice Note 4/2001 under the Listing Requirements of the Kuala Lumpur Stock Exchange. On 31 December 2002, Affin Merchant bank as adviser for Omega, announced to Bursa Malaysia (hereinafter referred to as 'Announcement No. 1'), that Omega and Milan
H Auto (M) Sdn Bhd ('MASB') had agreed to undertake and implement a Proposed Restructuring Scheme (hereinafter described as 'the Restructuring Scheme').

[2] The said announcement stated that *inter alia* that:

I a) MASB's principal activities are the importation, distribution marketing and sales, part sales and servicing of Alfa Romeo vehicles in Malaysia, pursuant to a Sales Concession Agreement between MASB and Fiat Auto SPA of Italy;

b) As an integral part of the Restructuring Scheme, the listing vehicle for the Restructuring Scheme (described in Announcement No. 1 as 'Newco'), was to acquire the retail management business of MASB consisting of marketing, sales, distribution, parts sales and servicing of Alfa Romeo vehicles) including MASB's operational assets relating to the aforesaid retail management business ('the New Core Business');

c) MASB was to remain as the importer of Alfa Romeo vehicles;

d) The Restructuring Scheme consisted of ten corporate exercises including:

i) A proposed Offer for Sale ('the Offer for sale') of 47,500,000 ordinary shares of RM1 each in the capital of Newco by MASB, by way of placement out to selected investors at RM1 each per share ('the Private Placement');

ii) The transfer of the listing status of Omega to Newco;

iii) The injection of the New Core Business by MASB into Newco by way of:

[1] Business Transfer Agreement dated 31 December 2002 ('the Business Transfer Agreement') between MASB and Milan Auto Corporation Sdn Bhd (Company No. 600545-D) ('MAC') whereby MASB shall transfer the New Core Business to MAC.

[2] a Vehicle Supply Agreement to be entered into between MASB and MAC whereby MASB shall supply to MAC Alfa Romeo vehicles and spare parts and grant MAC the right to sell and distribute Alfa Romeo vehicle and spare parts and to provide vehicles services. In consideration of this arrangement MAC will purchase the Alfa Romeo vehicles and spare parts exclusively from MASB;

[3] MASB guarantees that after the transfer of MASB's business, the annual profit after tax of MAC for the financial years ending 31 December 2003 and 31 December 2004 shall be at least RM15 Million ('Guaranteed PAT'); and

[4] the acquisition of the total share capital of MAC by Newco from MASB for a purchase consideration of RM120,000,000 to be satisfied by the issuance of

120,000,000 Newco shares at an issue price of RM1 per shares to MASB, whereby MAC will then become the wholly owned subsidiary of Energro;

e) The rationale for the Restructuring Scheme being *inter alia*, to inject a new core business which would provide immediate and stable source of revenue, profit and cash flow for Newco and to raise fresh capital funds to finance the working capital of the new assets to be injected into Newco; and

f) Affin Merchant Bank had been appointed as the advisor for the Restructuring Scheme.

[3] On 30 January 2003, Omega through its adviser Affin Merchant Bank submitted a proposal to the Securities Commission ('the SC') for the Restructuring Scheme to be undertaken by Omega and MASB ('the Proposal'). On 3 September 2003, Affin Merchant as merchant bank and adviser for the restructuring Scheme, announced to Bursa Malaysia ('Announcement No. 2') that the SC had *vide* its letter dated 28 August 2003 approved the Restructuring Scheme ('the Approval'). The SC had expressly instructed in the approval that the Newco was to fully particularize in the information circular to shareholders and in the Prospectus, the following:

a) The risks connected to the industry where the Newco intends to operate including the terms of the Sales Concession Agreement between MASB and Fiat Auto SPA Italy;

b) The tenure of the franchise with Fiat Auto SPA and the terms for the extension of the aforesaid franchise;

c) The dependence of the Newco group on just one supplier; Fiat Auto SPA as its sole business; and

d) MASB's plans to reduce the risk associated with the sales arrangement with MAC

[4] Thereafter on 1 January 2004, Affin Merchant as the merchant bank and adviser for the Restructuring Scheme had on behalf of Omega issued the Explanatory Statement/Circular to Shareholders dated 1 January 2004 ('the ES') in connection with the Restructuring Scheme. The contents of the ES was made publicly available/disseminated to the public by way of Submission/ Announcement of the same to Bursa Malaysia by Affin Merchant.

[5] The ES stated and represented *inter alia* as follows: A

a) That MASB's principal activities were the importing, marketing and distribution of Alfa Romeo vehicles including Alfa Romeo vehicle parts, wares, merchandise and accessories in Malaysia;

b) That MASB is the franchise holder for Alfa Romeo vehicles pursuant to the Sales Concession Agreement dated 1 February 1990 between MASB and Fiat Auto SPA of Italy ('the Sales Concession Agreement'); B

c) That Energro has been identified as the listing vehicle for the Restructuring Scheme; C

d) That the injection into Energro of MASB's retail management business of marketing and distributing Alfa Romeo vehicles in Malaysia was an integral part of the Restructuring Scheme; D

e) That the injection of MASB's retail management business was effected by way of:

i) The Business Transfer Agreement and the Vehicle Supply Agreement dated 28 January 2003 made between MASB and MAC; and E

ii) The acquisition of the total share capital of MAC by Energro pursuant to the Sales and Purchase Agreement dated 28 January 2003 and the Supplemental Agreement dated 1 July 2003. F

f) That Fiat Auto SPA has been informed of the Business Transfer Agreement and there is no objection;

g) That Energro depends on MAC's core and only business, which is the marketing and distributing of Alfa Romeo vehicles. Correspondingly, MAC, through the Vehicles Supply Agreement with MASB, depends on MASB's Sales Concession Agreement with Fiat Auto SPA; G

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h) That MASB's status as the importer and distributor of Alfa Romeo vehicles in Malaysia is subject to termination risk on its agreement with Fiat Auto SPA of Italy, which will cause the Vehicles Supply Agreement between MASB and MAC to cease to be in effect in the event of the inability of MASB to supply the Alfa Romeo cars to MAC; I

A i) the other proposals to be undertaken as part of Omega's Restructuring Scheme included the following:

i) that 47,500,000 ordinary shares of RM1 each in the capital of Energro to be placed out by MASB to selected
B investors through private placement at an offer price of RM1 per share;

ii) the transfer of the listing status of Omega on the main board of the Bursa Malaysia to Energro and the admission of the entire issued and paid up capital of Energro to the
C Official List of the Main Board of Bursa Malaysia and

j) That the rationale for the Restructuring Scheme was among others to inject a new core business which would provide immediate and stable source of revenue, profit and cash flow
D for Energro and to raise fresh capital funds to finance the working capital of the new assets to be injected into Energro.

[6] On 24 April 2004, Affin Merchant as the merchant bank and adviser for the Restructuring Scheme had on behalf of Energro
E issued the Prospectus dated 24 April 2004 ('the Prospectus') in connection with the Offer for Sale of Energro Shares by Scheme Creditors of Omega as part of the restructuring Scheme. The contents of the Prospectus was made publicly available/ disseminated to the public by way of Submission/Announcement of
F the same to Bursa Malaysia by Affin Merchant. The Prospectus reaffirmed the details of the injection of the New Core Business into Energro as set forth in the Restructuring Scheme and described above.

G **[7]** On 27 May 2004, the SC requested Bursa Malaysia to defer the listing of Energro shares until further notice. On 2 August 2004, the SC announced that its approval for the restructuring Scheme and the listing of Energro shares on Bursa Malaysia had been revoked, after discovering that there was no New Core
H Business, as represented in the proposal for the Restructuring Scheme.

[8] In the interim, MASB had proceeded to sell the ordinary shares to selected investors through private placement at the offer price of RM1 per share. KLCS Asset Management Sdn Bhd
I ('KLCS') agreed to purchase from MASB ('the KLCS Agreement') 1,000,000 ordinary shares of RM1 each in the capital of Energro ('the KLCS Placement Shares') at the offer price of

RM1 per share involving a total consideration of RM1,000,000 evidenced by *inter alia* the letter dated 24 March 2004 from MASB addressed to KLCS. On 29 December 2004, KLCS absolutely assigned to the 1st appellant, all of its rights, claims, interests in and title to and all benefits accruing to it as the assignor under and in relation to the placement agreement with MASB and all relevant contracts and chooses in action (whether present, existing, future, prospective or contingent)including all rights of bringing an action or right to receive, sue for, prosecute, participate in recover or enforce any debt or money or damages or any cause of action whatsoever from or against any party under and/or in relation to or in connection with the Energro shares, *vide* a deed of assignment dated 29 December 2004.

[9] The 2nd respondent had agreed to purchase from MASB ('the 2nd's respondent's agreement') 1,000,000 ordinary shares of RM1 each in the capital of Energro ('the 2nd respondent's Placement Shares) at the offer price of RM1 per share being a total consideration of RM1,000,000, evidenced by *inter alia* the letter dated 24 March 2004 from MASB addressed to the 2nd respondent. In accordance with the 2nd respondent's agreement, the 2nd respondent had *vide* their letter dated 26 March 2004 instructed AmTrustee Berhad to make arrangements to pay MASB for the 2nd Respondent's Placement Shares and towards this end the 2nd respondent had also enclosed an EON Bank Berhad cheque No. 939780 for the sum of RM1,000,000 in favour of AmTrustee Berhad. Pursuant to the letter dated 29 March 2004, AmTrustee Berhad had forwarded the sum of RM1,000,000 to MASB *via* an MBB cheque No. 799301 and MASB had *vide* its letter dated 29 March 2004 acknowledged receipt of the aforesaid payment and forwarded the transfer and share certificate of the 2nd respondent's Placement Shares to AmTrustee Berhad for onward transmission to the 2nd respondent.

[10] The 3rd respondent agreed to purchase from MASB ('the 3rd respondent's agreement') 4,350,000 ordinary shares of RM1 each in the capital of Energro ('the 3rd respondent's Placement Shares') at the offer price of RM1 per share involving a total consideration of RM4,350,000, evidenced by *inter alia* the letter dated 18 February 2004 from MASB addressed to the respondent. In accordance with the 3rd respondent's agreement, the 3rd respondent paid the sum of RM4,350,000 ('the monies') to MASB. On or around June 2004, the 3rd respondent's Placement Shares were received by the 3rd respondent.

[11] Unknown to KLCS and the 2nd and 3rd respondents, at the time of their purchase of the shares, the Sales Concession Agreement had already been mutually terminated by way of a Settlement Agreement dated 30 Sept 2003 between Fiat Auto and MASB. This prompted the SC to revoke its original approval for the Restructuring Scheme and the listing of the Energro shares. The SC then instituted a Civil Suit by way of Kuala Lumpur High Court *vide* Originating Summons No. D4-21-51-2004 ('the SC Suit') against Omega, MASB, Energro and one Kenneth Chow ('the SC suit defendants') seeking various orders including a declaration that all contracts relating to the sale and offer for sale of Energro shares (which includes the KLCS Agreement and the 2nd and 3rd respondent's agreement) be set aside as void *ab initio* and that *inter alia* MASB and Kenneth Chow repay and restore the monies paid for such Energro shares. On 28 April 2005, the Kuala Lumpur High Court granted an order in terms of the SC Suit including the declaration that all contracts relating to the sale and offer for sale of Energro shares (which includes the KLCS agreement, the 2nd respondent's agreement and the 3rd respondent's agreement) be set aside as void *ab initio* and that *inter alia* MASB and Kenneth Chow repay and restore the monies paid for such Energro shares. Until to date the respondents' have not received any repayment of monies for the Energro Shares nor has there been any repayment or restitution been made by MASB or Kenneth Chow.

Appellants' Cause Of Action

[12] The appellants' cause of action can be said to be two fold. The first is for negligence and/or negligent misstatements ('first claim'). The second is for damages for breach of statutory duty (second claim). As regards the first claim the respondent relies on the following misstatements:

i) The respondent's representation in the ES that the Sales Concession Agreement was still subsisting and enforceable when this had ceased to be true at the time of the release of the ES;

ii) The respondent's representation in the ES that Fiat Auto had been informed of the Business Transfer Agreement and that Fiat Auto had no objections to the same when this was palpably false and untrue; and

iii) The respondent's representation in Announcement No. 1, Announcement No. 2 and the ES that the New Core Business being MASB's retail management business of Alfa Romeo vehicles could be lawfully transferred to MAC *vide* the Business Transfer Agreement and the Vehicle Supply Agreement when this was not possible contractually and consequently untrue.

[13] As regards the second claim, the appellant relies on the respondent's breach of s. 32B(1) of the Securities Commission Act 1993(SCA) read with s. 58(1) of the same Act. Section 32B(1) of the SCA provides that:

> Where any statement or information is required to be submitted to the Commission under this Division in relation to or in connection with any proposal submitted pursuant to Section 32:
>
> (a) An applicant, any of its officers or associates;
>
> (b) A financial adviser or an expert; or
>
> (c) Any other person,
>
> Shall not:
>
> (aa) submit or cause to be submitted any statement or information that is false or misleading;
>
> (bb) submit or cause to be submitted any statement or information from which there is a material omission; or
>
> (cc) engage in or aid or abet conduct that he knows to be misleading or deceptive or likely to mislead or deceive the Commission.

and s. 58(1) of SCA provides that:

> (1) A person shall not act in a manner that is misleading or deceptive or is likely to mislead or deceive in connection with:
>
> (a) Any prospectus issued;
>
> (b) The allotment of, issue of, offer for subscription or purchaser of, or invitation to subscribe for or purchase, securities;
>
> (c) ... or
>
> (d) The carrying on of negotiations, the making of any arrangements or the doing of any other act preparatory to or in any other way related to any matter referred to in paragraph (a), (b) or (c)

[14] The appellants' second claim for breach of statutory duty is premised on the allegation that the contents of the announcements and the ES constitute statements or information which are 'in relation to or in connection with' the proposal submitted by the respondents for the restructuring of Omega. Furthermore that this proposal contained information that were false and misleading namely that:

i) The Sales Concession Agreement subsisted and continued to subsist;

ii) That Fiat Auto had been informed of the Business Transfer Agreement and that Fiat Auto had no objections to the same; and

iii) The New Core Business being MASB's retail management business of Alfa Romeo vehicles could lawfully be transferred to MAC vide the Business Transfer Agreement and the vehicle supply agreement.

Respondent's Defence

[15] The respondent by its statement of defence sought to defeat the appellants' first claim by raising three defences. The first defence was that there was no such duty of care to the appellant. The basis for this defence was that the respondent was not a party to any of the private placements entered into between the appellant and MASB and consequently had no knowledge of the same ("FIRST DEFENCE" – see para. 21 of the respondent's statement of defence). The second line of defence was that it had discharged its duty of care to the appellant in that it had taken all reasonable steps to ensure that the statement and/or information as contained in the announcements and the ES were timely, accurate and without any omission of any material information. The respondent also sought to bring itself within the defence afforded by s. 32B(2) of the SCA by claiming that it had appointed professionals to a Due Diligence Working Group ('DDWG') to undertake all necessary enquiries and that it had only submitted the documents following the final verification by them of all the information contained in the documents ("SECOND DEFENCE" – see paras 25, 42 and 43.4 of the statement of defence).The third defence was the repudiation by the respondent of the appellants' claim that they were induced to enter into the private placement agreements with MASB by the contents of the Announcements and the ES. ("THIRD DEFENCE" – see para 31 of the statement of defence).

Judgment Of The Court

[16] In our judgment, there is no doubt that the respondent owed a duty of care to the appellant. In fairness to the respondent, it must be pointed out that the respondent did not seriously challenge the existence of the duty of care save in the very limited way pleaded in para. 21 of its statement of defence.

[17] In support of this limited plea, the submission of counsel for the respondent was that unlike the situation with the special issue which was managed by the respondent and the proceeds protected by way of the monies being held by stakeholders, the appellants' purchase of the shares in question was directly from MASB following the offer for sale by MASB to private investors. The gross proceeds from the proposed offer for sale of 47,500,000 shares were to accrue to MASB directly, and no part of the proceeds was received by Energro. The respondent's role as placement agent for the offer for sale was also on a "best endeavour" basis only, and not as part of their role and responsibility as Financial Adviser in the Proposed Restructuring Scheme. Based on the aforesaid facts, counsel for the respondent submitted that the Private Placement pursuant to the Offer for Sale constituted a private contractual agreement between MASB and the appellants and did not involve the respondent. By this submission, we understood counsel to be contending that the scope of the duty of care owed by the respondent did not extend to the appellants and less still to the transactions undertaken directly by the appellant with MASB.

[18] We now propose to examine the law as regards the scope of the duty of care in cases involving negligent misstatements. The most comprehensive attempt to articulate a single general principle appears in the well known passage from the speech of Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] AC 728, 751-752:

> Through the trilogy of cases in this *House* - *Donoghue v. Stevenson* [1932] AC 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the

A person who has suffered damage there is an sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* cast [1970] AC 1004 per Lord Reid at p. 1027.

[19] In the context of this appeal the answer to the first question is not in doubt and the learned trial judge has correctly answered the question in the affirmative. The outcome of this appeal really revolves around whether the learned trial judge has answered the second question correctly. The answer to this question revolves around the extent of the scope of the duty of care owed by an adviser such as the respondent to investors of shares who claim to have been induced to purchase such shares based on a report produced by the respondent adviser. This issue was considered more recently by the House of Lords in the case of *Caparo Plc v. Dickman* [1990] 2 AC 605. In this case, Lord Bridge of Harwich writing the leading judgment of the House after making reference to the above passage in the speech of Lord Wilberforce acknowledged that since *Anns v. Merton London Borough Council* case a series of decisions of the Privy Council and the House of Lords have emphasized the unsuitability of any single general principle to provide a practical test which can be applied to every situation to determine the scope of duty of care. According to His Lordship:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the duty to whom it is owed a relationship characterised by the law as one of proximity "or neighbourhood and the situation should be one in which the Court considered it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

His Lordship then proceeded to acknowledge that:

> one of the most important distinctions always to be observed lies in the law's essentially different approach to the different kind of damage which one party may have suffered in consequence of the

act or omission of the other. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss.

His Lordship after referring to the cases involving economic loss discussed the extent of the scope of duty with regards to persons and transactions in the following passage:

The salient feature of all these cases is that the Defendant giving advice or information was fully aware of the nature of the transaction which the Plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the Plaintiff would rely on the advice or information in deciding whether or not to be engaged in the transaction in contemplation. In these circumstances the Defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the Plaintiff would rely on the advice or information given by the Defendant for the very purpose for which he did in the event rely on it. So also the Plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it. The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo CJ to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". See *Ultramares Corporation v. Touche* [1931] 174 NE 441, 444; it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement. Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the "limit or control mechanism … Imposed upon the liability of wrongdoer towards those who have suffered economic damage in consequence of his negligence" rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the "proximity" between the Plaintiff and the Defendant, that the Defendant knew that his statement would be communicated to

A the Plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind (eg, in a prospectus inviting investment) and that the Plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind.

B

[20] For the purposes of this judgment, it is useful to also examine the same test formulated in an earlier judgment of the English Court of Appeal in the case of *Candler v. Crane, Christmas & Co.* [1951] 2 KB 164. The usefulness of this test is that it was C approved unanimously by the Law Lords in *Caparo Plc v. Dickman* (see the judgment of Lord Oliver of Aylmerton at p. 637 of the judgment). Denning LJ in a dissenting judgment in this case, formulated the test in this manner:

D Let me now be constructive and suggest the circumstances in which I say that a duty to use care in statement does exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make E reports on which other people – other than their clients – rely in the ordinary course of business.

Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client; F and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom G they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they are not, as a rule, responsible for what he does with them without their knowledge or consent ... The test of proximity in these case H is: did the accountants know that that accounts were required for submission to the Plaintiff and use by him?

Thirdly, to what transaction does the duty of care extend: it extends, I think, only to those transactions for which the accountants knew their accounts were required. For instance, in I the present case it extends to the original investment in £2,000.

[21] We have intentionally set out the test to be applied in determining the scope of the duty of care in cases involving economic loss since we are concerned with one such case in this appeal. In our judgment, applying the test formulated by Lords Bridge and Lord Denning the answer to the second question is clearly that there exists a sufficient proximity between the respondent and the appellants. Apart from the regulatory provisions, the respondent was or ought to have been aware that the announcements and ES authored by them would reach investors such as the appellants and be relied upon by them. This is to be expected since the documents were forwarded to the Bursa and the information disseminated to members of the public so as to invite interest among investors in the restructuring scheme and the offer for sale. It is in evidence that these documents were made available to the respondents. Additionally, when regard is had to the regulatory provisions such as the listing requirements of Bursa Malaysia, it is evident from a perusal of section 2.03(2) of the Listing Requirements of Bursa Malaysia that one of the reasons for the respondent being required to be accurate with the information contained in the documents authored by them is to enable investors and members of the public to be informed of all facts and information that may have a material effect on the price, value or market activity in the involved securities. Indeed, this was admitted to be the case by DW1 himself. The respondent in performing the role assigned to it under the regulations regulating the capital market must ensure that it provides investors with accurate information obtained from independent sources of the highest quality. In our opinion, this explains why the respondent needs to be licensed by the SC to perform this role. The related question of whether the duty of care extended to the transactions concluded by the appellants must equally be answered in the affirmative since the documents included reference to the offer for sale of the shares allocated to MASB pursuant to the restructuring scheme and to the sale by them directly to investors of such shares by private placement. In other words transactions of the nature concluded between the appellants and MASB were contemplated and provided for in the documents authored by the respondent. Accordingly, we have no hesitation in holding that the respondent owed a duty of care which extended to the appellants and to the particular transactions concluded by their predecessors in title with MASB.

A **Second Defence**

[22] Before we proceed to consider this particular defence of the respondent, it would be useful to know that the misstatements are those spelt out in para. 12 of this judgment. It is also to be noted B that under the specific provisions of the Sales Concession Agreement:

a. MASB was to purchase and resell the Contract Products (defined as Alfa Romeo vehicles and original spares) in its own name and behalf. In this regard, MASB was obliged to inspect C and service all contract vehicles prior to the delivery to the end purchasers and to provide a warranty and after-sales services to the end users;

b. The Sales Concession Agreement is not assignable by MASB, D not even in part; and

c. That any derogation from the provisions of the Sales Concession Agreement was to be the subject matter of prior agreement between the parties in writing.

E These provisions clearly show that the assignment of the Business Transfer Agreement and the Vehicle Supply Agreement was prohibited by the express terms of the Sales Concession Agreement. MASB was never capable of injecting the New Core Business into MAC as envisaged under the Scheme. Without the F injection of the New Core Business into MAC, the Restructuring Scheme could never be implemented.

[23] The thrust of the second defence of the respondent was that it had discharged its duty of care first by setting up the G DDWG, secondly, by ensuring that the members of DDWG complied with the checklist of the duties allocated to each of them and finally by issuing the ES after the express approval of the board of directors of Omega had been obtained. Following the setting up of the DDWG, specific responsibilities were allocated H to the various members of the group based on a due diligence planning memo. According to the respondent, under the terms of this planning memo, the respondent was assigned "an overseeing brief by Omega". Over and above observing these safeguards, the respondent claimed to have continuously requested confirmation I on the status of the Sales Concession Agreement at the various verification exercises and demanded confirmation from Kenneth Chow MASB's authorized representative. The respondent

contended that in all the circumstances of the case, it was entirely reasonable for the respondent and the DDWG to rely on the representations made by Kenneth Chow as regards the status of the Sales Concession Agreement.

[24] The appellants on the other hand contended that bearing in mind that it is not in dispute that material information included in the Respondent's ES and Announcements concerning the status of the Sales Concession Agreement is false, the respondent must necessarily have failed to make reasonable enquiry. The neglect of the respondent is all too evident, according to counsel for the appellant, when it is realized that the SC discovered the fact of the termination of the Sales Concession Agreement simply by writing to Fiat Auto, the other party to the Sales Concession Agreement. At all material times the respondent did not contact or enquire from Fiat Auto on the status of the Sales Concession Agreement. Counsel for the appellant contended that there is no plausible justification for the respondent's failure to contact Fiat Auto to confirm the status of the Sales Concession Agreement. The only step undertaken by the respondent regarding the subsistence and validity of the Sales Concession Agreement was to confirm this fact directly with Kenneth Chow who as the beneficial owner of MASB had every reason to be less than charitable with the truth concerning these matters, to the knowledge of the respondent.

[25] In our judgment the respondent's claim to have discharged its duty of care can be summarised to be:

a) That under its terms of appointment it was only required to oversee matters and under no obligation to independently verify any information provided by the directors of Omega and MASB;

b) That it set up the DDWG and it was entitled to expect the members of the DDWG to undertake their work in a professional manner and to rely on their professional skill;

c) That on matters concerning the status of the Sales Concession Agreement it was entitled to rely on information provided by Kenneth Chow since he was intimately involved in the agreements; and

A d) It only issued the ES after the contents were approved by the members of the DDWG and the Board of Directors of Omega and MASB.

[26] With respect, in our judgment, the steps undertaken by the B respondent in the purported discharge of its duty of care falls far short of that expected of a licensed Merchant Banker. We opine to this effect for the following reasons. First, the respondent being licensed to be adviser in respect of restructuring schemes and the issuer of prospectus cannot delegate its duties under the SCA and C related legislation to third parties irrespective of how qualified the members of DDWG may be. The reason is obvious. The party vested with the responsibility under the SCA to ensure that the provisions of the SCA are observed is the respondent and not the members of the DDWG. This is evident from section 9.16 and D clause 3.02 of the Securities Commission Policies and Guideline:

i) Sections 9.16(1)(a)-(c) of the Listing Requirements provide that an adviser must ensure that the Announcements are:

a) Factual, clear, unambiguous, accurate, succinct and E contains all such information as securities holders and their professional advisers would reasonably require and reasonably expect to find in a circular of that nature, for the purpose of making an informed decision;

F b) Not false, misleading and/or deceptive;

c) Balanced and fair. Thus, the announcement must avoid amongst other:

(i) The omission of material fact …

G

ii) Clause 3.02 of the Securities Commission Policies and Guidelines on Issue/Offer of Securities ('the SC Guidelines') provides that:

> H The advisers have a professional responsibility to satisfy themselves and ensure, based on all available information, that the application is suitable for the specific proposal being submitted for consideration. The advisers should exercise due diligence expected of them in the preparation of I the application. They should not allow their names to be associated with any application to the SC unless they are satisfied that, based on all available information and to the best of their knowledge and

> belief, the application constitutes a full and true disclosure of all material facts about the proposal being submitted for consideration

This explains why the SC had issued a show cause notice to the respondent and thereafter reprimanded the respondent. The reprimand was issued following SC's findings that the respondent had failed to undertake the necessary step to verify the status and validity of the Sales Concession Agreement. Secondly, under the SCA, it is the respondent who owed the duty of care to the appellants and not the members of the DDWG. Accordingly, it is not a defence to the appellants' claim that the respondent had appointed a competent DDWG or that it had relied on their expertise and had only issued its report with their blessings and that of the board of directors of MASB. Thirdly, the defence that it had relied on Kenneth Chow really demonstrates the gross nature of the neglect on the part of the respondent as it should have been apparent to the respondent that it was in the interest of Kenneth Chow and the Board of Directors of Omega and MASB to provide information that suited their pecuniary interests. In other words, it should have been apparent to the respondent of the need to verify the accuracy of material particulars such as those forming the subject matter of the misstatements from either the parties to the agreement itself or from independent sources and not from parties who had interest in the outcome of the restructuring scheme. At this juncture, we are compelled to refer to the pronouncements of this court in the case of *Malaysian International Merchant Bankers Bhd v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* [2001] 1 CLJ 740 where the Court of Appeal made the following observation:

> In light of the position of the Appellant as merchant bankers, it is our view that they cannot be heard to say that they are merely playing the role of a finder of bumiputra purchasers of the shares of the company and that whatever information they supplied to the Appellant were simply passed on from the company. It is our view that being merchant bankers, they owe a higher duty to the Respondent than that of a mere finder. They certainly owe a higher burden when supplying any information from the company to the Respondent. They ought to ascertain and verify all information from the company to the Respondent.

[27] The learned trial judge after acknowledging the principles of law pronounced in the case of *Malaysian International Merchant Bankers Bhd v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* as correct, nevertheless, declined to apply the

principles therein to the facts of this case. His Lordship advanced two grounds for refusing to apply the pronouncements of the court in *Malaysian International Merchant Bankers Bhd v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* to the facts of this case. The first ground was that the appellants' were solely to blame for their present predicament since, to use His Lordship's words:

> In the instant case, it was clear from the evidence the Plaintiffs will not have suffered any loss if money was paid into stakeholder's account knowing for sure that there are many risks involved in restructuring exercise which must be seen like a busy express way in respect of fortune or investment and many can be knock down if they are not vigilant notwithstanding there are a number of regulatory safeguards to protect the investing public.

His Lordship further observed that:

> There is a duty first imposed on the Plaintiff to take reasonable precaution to safeguard his own interest before complaining others were negligent.

His Lordship concluded on the first ground that:

> In essence Court will not indemnify the Plaintiffs for its own negligence or carelessness.

[28] His Lordship's second ground was that "although the 2nd defendant is under duty to take care, they had observed the general requisite standard in the particular case and to their misfortune Kenneth Chow has stood as villain to defeat the listing process". We understand this part of His Lordship's judgment as amounting to a finding of fact that the immediate cause for the loss suffered by the appellants was not the respondent's breach but by the intervening fraudulent conduct of Kenneth Chow.

[29] In our judgment with the utmost respect to the learned trial judge, he was wrong on both grounds. We opine to this effect because the negligence of the respondent was in their failure to ascertain by reasonable enquiry that in fact MAC would not possess the new core business represented by the respondent in the various announcements and the ES authored by them. The fact of the matter is that by reason of the termination of the sales concession agreement and the prohibition against transfer, MASB was never capable of injecting the new core business into MAC

under the scheme. In other words, the restructuring scheme was a non starter from the outset. Under these circumstances, the shares of the parent company Energro would be worthless.

[30] In any event, in our opinion, the payment of the purchase price for the shares by the appellants' to MASB cannot amount to unreasonable conduct so as to deprive them of the relief sought by them since the offer for sale provided for MASB to sell by private placement to private investors such as the appellants and collect the proceeds directly from them. In this respect, it must be borne in mind that the respondent in breach of Section 8.03 of the guidelines and s. 158 of the SCA failed to open a stakeholders' account to secure the purchase consideration. This failure resulted in the respondent receiving the show cause notice from the SC and thereafter a public reprimand. With respect, we agree with the submission of counsel for the appellants that His Lordship's conclusion on the first ground effectively, without any justification, shifted the burden of creating the shareholders' account from the respondent to the shoulders of the appellants.

[31] Still on the first ground, His Lordship's findings of facts as regards the status of the stakeholder's account is not supported by the evidence. According to the evidence of PW1, the purchase price was paid directly to MASB because the announcements provided for the sale of the shares by private placement (see p. 320 of Jilid 4). The same witness gave evidence that the stakeholder's account existed only in respect of bumiputra shares and not for shares purchased by way of private placement (see p. 324 of Jilid 4). PW4 gave evidence to the same effect at p. 346 of Jilid 4. Admittedly, PW5 did concede that she had requested for the opening of a special account whereby the Managing Director of the company (see witness statement – 350 of Jilid 4) was to be a co-signatory. With respect, in our judgment, the fact that one of the appellants may have requested for a special account does not detract from the fact that under the provisions of the offer of sale of the Energro shares, MASB was entitled to sell the shares to investors by way of a private placement and the purchase price paid to them directly. Counsel for the respondent during the course of oral submissions before us did not seriously challenge the accuracy of the evidence of these witnesses. Indeed, he conceded that the stakeholder account existed for bumiputra investors only. Against these background facts, His Lordship's finding of fact that:

> It is clear that the 2nd and 3rd Plaintiffs had in fact placed the purchase price in a 'special account' but specifically authorized monies to be released to the 1st Defendant on their own volition when there was admission in the evidence of the Plaintiffs that there was risk involved in listing. The Plaintiffs did not take any prudent measures to protect their own investment.

is not supported by the evidence. In other words, the payment of the purchase price in accordance with the terms of the Offer For Sale cannot deprive the appellants of the relief sought by them.

[32] As regards the second ground, fraud as an intervening event to break the chain of causation is clearly not a factor on the facts of this case since the respondent was wrong in the first place to rely on Kenneth Chow for the reasons stated earlier in this judgment, as their source for verification of the information to be included in the announcements and the ES. Secondly, as highlighted earlier in this judgment, the appellants' claim in this case was for economic loss and for this reason, in our opinion, with respect, the learned trial judge was wrong to hold Kenneth Chow's fraud as breaking the chain of causation based on the case of *Woods v. Duncan* [1946] AC 4001, a case not involving economic loss.

Third Defence

[33] The third defence raised in the statement of defence of the respondent is that the appellants were not induced by the contents of the various announcements and the ES issued by the respondent. With respect, this defence does not merit any serious consideration since it is obvious that the announcements and the ES were issued for dissemination to members of the public including investors such as the appellants and consequently likely to be relied upon by them before the making of any decision as to whether they should invest in MAB.

[34] We now propose to deal with three other matters raised by the learned trial judge although these matters were not pleaded by the respondent. The first is the defence of contributory negligence, the second being the effect in law of the judgment obtained by the SC against MASB and Kenneth Chow in the SC Suit and that the agreements between the original purchasers of the shares and the appellants were champertous. Our preliminary observation is that all three matters were not pleaded and consequently ought

not to have been considered by His Lordship. In our judgment, His Lordship ought to have followed the pronouncements in the case of *Fookes v. Slaytor, Hamizna bin Abd Hamid v. Wong Kok Keong & Anor* and *Anuar bin Mat Amin v. Abdullah bin Mohd Zain* that failure to plead these defences was fatal. His Lordship by considering and thereafter dismissing the appellants' claim on the basis of the unpleaded defences, failed to follow the strictures contained in the decision of the Supreme Court in the case of *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 that:

> The Court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the Court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely which the party has not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[35] In our judgment, His Lordship ought not to have decided the outcome of the appellants' claims based on these matters particularly since, according to counsel for the appellants, these matters were raised by His Lordship himself. It is reasonable to infer that the appellants would have been prejudiced by the introduction of these matters during the trial. Furthermore, in our view, His Lordship was wrong to refer to accident cases in concluding that the appellants had contributed to their own losses in such a substantial manner as to deny them relief for the negligence of the respondent. In our opinion, His Lordship by considering accident cases failed to have due regard to the passage of Lord Bridge referred to earlier in this judgment which stressed 'the law's essentially different approach to the different kind of damage which one party may have suffered in consequence of the act or omission of the other. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss'. Finally, as regards the judgment obtained by the SC, with respect, we are unable to agree with the judge that this judgment precludes the appellants from pursuing this entirely different cause of action for negligence against the respondent.

A **The Appellants Alternative Claim For Breach Of Statutory Duty**

[36] We do not propose to deal with this aspect of the appellants' claim in the light of our decision that the respondent
B is liable in negligence.

Appellate Interference

[37] An appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at
C its decision. Additionally, appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. JCA Gopal Sri Ram (as he then was) in the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 explained what judicial appreciation of the evidence involved, in
D this manner:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighting and, for good reasons, either accepting or rejecting the whole or any
E part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness ay have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must
F also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal.

G **[38]** In our opinion, with respect, the learned trial judge fell into error both in the application of legal principles, as well, as in the judicial appreciation of the evidence. In summary, the errors committed by the learned trial judge included the following:

H a) The finding of fact that the appellants were solely to blame for the losses incurred by them since "It was clear from the evidence the plaintiff will not have suffered any loss if money was paid into stakeholders account" when, in fact, the respondent failed to open the stakeholders account and was
I reprimanded by the SC for not having done so. Additionally, this finding of the learned trial judge ignores the foundation of the appellants' claim in negligence, which was this. That the

respondent failed by reasonable inquiry to realize that there was no real new core business that was available for transfer to MAC thereby rendering the Energro shares to be worthless;

b) The learned trial judge's finding that the respondent "had observe the general requisite standard in the particular case and to their misfortune Kenneth Chow has stood as villain to defeat the listing process" cannot be supported in law in the light of the express provisions of the Security Commission Act 1993 and the SC Reprimand over the respondent's failure to undertake the necessary steps to verify the status and validity of the Sales Concession Agreement with Fiat Auto;

c) The consideration by the learned trial judge of unpleaded matters;

d) The failure of the learned trial judge to apply the pronouncements of this court in *Malaysian International Merchant Bankers Bhd v. Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam Malaysia* in holding the perfunctory enquiry made by the respondent of the directors of MASB to amount to a sufficient discharge of the respondent's duty of care and

e) The ruling of the judge that the fraud of Kenneth Chow served to break the chain of causation so as to deny the appellants the relief sought by them in this action by reference to a case which had no relevance to a claim for economic loss.

[39] For the above reasons we are unable to agree with the findings of the learned High Court Judge and we therefore allow the appeal and set aside the order of the High Court.

Conclusion

[40] In the light of our decision that the respondent was negligent, it follows that the respondent is liable in damages to the appellants. The damages payable being the purchase consideration paid by the respective purchasers to MASB and which purchase consideration remains outstanding arising from the aborting of the listing of the shares of Energro. Accordingly, we make the following orders:

A (a) We set aside the order of the High Court and further order the respondent to refund to the appellants the taxed costs paid by the appellants;

(b) That the respondent pay the 1st appellant the sum of RM1 million;
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(c) That the respondent pay the 2nd appellant the sum of RM1 million;

(d) That the respondent pay the 3rd appellant the sum of RM4,350,000;
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(e) That interest is payable in respect of all the amounts payable by the respondent at the rate of 8 % p.a from the date of judgment till realization;

D (f) We order the respondent to pay lump sum costs of RM117,000 by way of costs here and below to the appellants.

(g) The deposit is refunded to the appellants

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